UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

ROCKWELL MINING LLC

and **Case 09-CA-206434**

UNITED MINE WORKERS OF AMERICA, INTERNATIONAL UNION, AFL-CIO

RESPONDENT ROCKWELL MINING LLC'S ANSWERING BRIEF TO THE GENERAL COUNSEL AND THE CHARGING PARTY'S EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

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RESPONDENT ROCKWELL MINING'S ANSWERING BRIEF TO THE GENERAL COUNSEL AND THE CHARGING PARTY'S EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

Respondent Rockwell Mining, LLC submits this answering brief to the General Counsel and the Charging Party's exceptions to the decision of the Administrative Law Judge.

I. STATEMENT OF THE CASE

Administrative Law Judge (ALJ) Paul Bogas, who has been an NLRB judge for 18+ years, presided over the hearing on April 3 and 4, 2018 in Charleston, West Virginia. On June 4, 2018, ALJ Bogas issued his Decision (ALJD) in the case. (JD-37-18). ALJ Bogas dismissed the Complaint, and failed to find that Respondent suspended and discharged its employee Jerry Hager for engaging in union and protected activities for testifying at a National Labor Relations Board (Board) hearing in violation of Section 8(a)(1), Section 8(a)(3), and Section 8(a)(4) of the Act as alleged. On August 1, 2018, Counsel for the General Counsel (General Counsel) and the Charging Party, the United Mine Workers of America, International Union, AFL-CIO, (the Charging Party) filed exceptions to the ALJ's Decision (General Counsel's Exceptions; Charging Party's Exceptions), excepting to the ALJ's findings of facts, inferences and conclusions of law. Both parties filed briefs in support of their exceptions. [1] (General Counsel's Brief; Charging Party's Brief). The General Counsel raised fourteen exceptions to the ALJ's Decision. The Charging Party adopted and incorporated the General Counsel's exceptions, and raised two additional exceptions. Pursuant to the Board's Rules and Regulations § 102.46(d)(1), Respondent submits this Answering Brief to the General Counsel's and the Charging Party's exceptions, which addresses each exception.

[1] References to the Exhibits of Respondent, General Counsel, and to Joint Exhibits are designated as "RX-#," "GCX-#", and "JX-#" respectively, with the corresponding number for the exhibit. References to the transcript are designated as "Tr. at #," with the corresponding page number. References to ALJ Bogas' decision are referred to as ALJD, with the corresponding page number. References to the General Counsel's Brief are designated as GC Brief, with the corresponding page number.

II. STATEMENT OF FACTS

A. RESPONDENT'S OPERATIONS

Respondent, Rockwell Mining, is a subsidiary of Blackhawk Mining LLC and operates both surface and underground coal mines in Southern West Virginia, including four locations where its employees are represented by the Charging Party. (ALJD at 2; Tr. at 129-130). In 2016, Respondent began construction of a surface mine it called the Glancy mine. By late spring 2017, Respondent began producing coal at the Glancy mine and by the summer of 2017 had its initial complement of approximately 55 hourly employees. (JX-4).

B. UNION CAMPAIGN AT GLANCY MINE

On July 7, 2017, Respondent became aware that the Charging Party was soliciting employees to sign representation cards. (ALJD at 2; JX-1). Respondent held four meetings with employees where it discussed the Charging Party's organizing campaign. (ALJD at 3-4; Tr. at 132-136). During those meetings, employees were given an opportunity to ask questions. Hager was one of several employees who used the opportunity to raise concerns about Respondent's equipment, and about employee personnel matters. (ALJD at 3; Tr. at 132-136).

On August 3, 2017, the union representation election was held, resulting in a vote of 27 employees in favor of representation by the Charging Party, and 25 employees against. (ALJD at 4). James "Curly" McDonald served as the Charging Party's observer during the election. (JX-1; Tr. at 139). Respondent filed exceptions to the election, and the Board held a hearing over those exceptions on August 24, 2017. (ALJD at 4; Tr. at 141). The Charging Party called Hager, McDonald and David Muenich as witnesses during the hearing, and they all provided testimony in support of the Charging Party's position.[2] (ALJD at 4; Tr. at 141).

[2] The ALJ correctly noted, and the General Counsel did not except, that the "record does not show that Respondent directed antiunion statements or threats at Hager or his protected activity. Nor is there evidence that the Respondent attempted to interfere with Hager's pro-union efforts during the campaign or his cooperation with the Union during

C. JERRY HAGER'S EMPLOYMENT AT RESPONDENT

On April 4, 2017, Jerry Hager applied for a position at the Glancy mine. Prior to applying for a job with Respondent, Hager had worked at a neighboring surface mine, Hobet Mining LLC, for almost 9 years. (Tr. at 67; RX-20). Hager was an experienced rock truck operator. (Tr. at 67-69; RX-20 at 26). He was task trained on the rock truck at both Hobet Mining and Progress Coal. (Tr. at 67-68). Moreover, Hager was specifically trained on the Caterpillar 785C rock truck. (Tr. at 69). In addition to operating the Caterpillar 785C truck, Hager operated larger rock trucks at two different coal companies for over a dozen years. (Tr. at 67-68; RX-20).

On April 25, 2017, Hager began work at Respondent as a mobile equipment operator. (Tr. at 340). As a mobile equipment operator, Respondent hired Hager for a basic equipment operator position, and he could be directed to fill any of its equipment positions and perform other tasks as needed to enable Respondent to perform more proficiently as production needs changed. (RX-20; Tr. at 340-342). Hager was initially assigned to work on the night shift operating the D11 bulldozer and the excavator. (ALJD at 2; Tr. at 25).

On July 17, 2017, per Hager's request, Respondent transferred Hager to the day shift. (ALJD at 3). Respondent initially assigned Hager to a water truck, but after Hager protested that he was not comfortable operating a water truck, Respondent assigned Hager to the Caterpillar 785C rock truck, a truck where he was an experienced operator. (ALJD at 3-4; Tr. at 94, 340).

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the representation proceeding. [...] [T]he General Counsel has not alleged or shown that the Respondent exceeded the bounds of its lawful right to campaign against unionization." (ALJD at 15). Further, to the extent, that the General Counsel is using lawful statements on Respondent's views on unionization as support of his argument, his argument does not have merit. Section 8(c) specifically states that "the expressing of any views, arguments or opinion [...] should not be constitute or be evidence of an unfair labor practice [...] if such expression contains no threat of reprisal or force or promise of benefit." (Emphasis added).

D. JERRY HAGER'S ACCIDENT

On July 24, 2017, Respondent assigned Hager to operate the Caterpillar 785C rock truck, as he had been operating it without issue since July 17, 2017.[3] (ALJD at 4). The truck is almost 35 feet long, 19 feet high, about 22 feet wide, and weighs 550,000 pounds when fully loaded. (RX-3). A storage compartment is located underneath the buddy (passenger) seat. (RX-3; RX-15; Tr. at 230). The storage compartment is 24 inches wide, 17 inches deep, and 14 inches long (about 3.2 cubic feet), which provides sufficient space to accommodate an employee's hard hat or other loose personal items. (ALJD at 5; Tr. at 268). In addition to the storage compartment, the inside of the operator cab contains a hook by the door that allows the operator to hang a coat or a hard hat. (RX-15).

On July 24, 2017, Hager entered the truck and placed several loose items on the buddy seat, including his hard hat. (ALJD at 5). Hager did not check the storage compartment to see if there was room for his hard hat, nor did he attach the hard hat to the hook inside of the cab. (ALJD at 5; Tr. at 55-56, 74-75). At approximately 9:30 am, Hager drove down an incline, and took a right turn. (ALJD at 5; Tr. at 52). When Hager made the right turn, his hard hat slid off the buddy seat and into the area between the buddy seat and the foot pedals. (Tr. at 79). The hard hat was located about a foot away from the foot petals, and did not interfere with the operation of the truck. (Tr. at 58, 79).

Although there was nothing that would have interfered with Hager stopping the truck and putting it in park first, Hager, while still driving bent down below the dashboard of the truck, completely obstructing his view of the road, to retrieve his hard hat. (ALJD at 5; Tr. at 79). When Hager returned his gaze above the dashboard, he was headed straight towards the berm, which is a pile of rock and dirt on the edge of the road around six to seven feet high. (Tr. at 80).

[3] The ALJ relying on undisputed testimony, correctly noted that there were no adverse weather or road conditions on July 24, 2017. (ALJD at 4).

Hager continued to drive straight through the berm, which caused Respondent's truck to roll over at least one complete revolution, rolling down a slope, coming to rest on its side on the slope sixty feet below. (ALJD at 5; Tr. at 81-82). There was no evidence of brake marks before Hager hit the berm. (Tr. at 82). Hager's accident was catastrophic enough that it could have been fatal. Remarkably, Hager was not killed, but he did suffer injuries to his spine and head, and he was transported to the hospital. (Tr. at 62). Once Hager received medical attention, Respondent's General Manager Joe Evans and Human Resources Manager Colin Milam called Hager about his accident. Hager informed them that there was not anything wrong with the truck or the grade of the road, and the accident was "100 percent Jerry Hager." (ALJD at 5; Tr. at 69-70, 175, 344-347).

Following Hager's accident, the Mine Safety and Health Administration (MSHA) issued a 103(k) order and shut down the mine. (RX-6; Tr. at 152). Once a 103k order is issued, Respondent must follow a detailed plan to resume operations, which requires MSHA permission to operate in the area. (Tr. at 151-152). Respondent did not receive MSHA's approval to have the mine fully functioning until August 15, 2017, a period of 22 days. Once Respondent had MSHA's approval to move the truck Hager had wrecked, it was out of service undergoing repairs for a month. In total, the repairs required 200 hours of Respondent's mechanics' time to complete, and $61,000 in replacement parts.[4] (Tr. pp. 207-272; RX-16).

After completing its investigation, MSHA issued two citations to Respondent: one citation for Hager's failure to maintain control of his truck while it was in motion, and another citation for Hager's hard hat and lunch box not being secured in the operator cab. MSHA characterized the accident as "significant and substantial," but ultimately found that

[4] These expenses are in addition to the untold expense of Respondent shutting down its operations at Glancy mine for three weeks.

Respondent's negligence was low because Respondent could not have anticipated Hager's actions. (RX-6).

E. JERRY HAGER'S SUSPENSION AND DISCHARGE

After his accident, Hager remained off work on worker's compensation benefits until September 15, 2017. (ALJD at 8; Tr. at 64). During that time, MSHA conducted a substantial investigation into what led to Hager's accident. On September 15, 2017, when Hager returned to work, Evans and Milam interviewed Hager about the accident. (Tr. at 175, 347-348). Hager mentioned, for the first time to Evans and Milam, that he had not been task-trained on the truck. (Tr. at 69). However, Hager never mentioned that his lack of task training impacted his accident in any way. (Tr. at 69-70). Evans informed Hager that they examined his training, and believed Superintendent James Miller had, in fact, task trained him.[5]

Evans and Milam determined that Hager's decision to remove his line of vision from the road completely while continuing to operate the vehicle was so reckless that discharge was warranted. Milam testified as to why discharge was appropriate:

> It was reckless to do what he did in the piece of equipment [...] [C]ompared to the other ones, you know, it was simply not paying enough attention, but [...] Hager could have stopped the truck, got the hard hat if it was that big a deal, put it back up, secured it, whatever he needed to do, but instead he decided to take his head, dip it under the console and try to get his hard hat. I deemed that a reckless act that could –that could have killed him."[6] (Tr. p. 360).

Similarly, Evans testified:

> [Hager] basically and unfortunately, made an error in judgment when he was driving a truck [as big as the hearing courtroom], in a turn, decided to duck his head down below the dash for some reason [...] [H]e went through the berm [...]

[5] As the ALJ noted, Evans reasonably formed this belief on the basis of his conversations with Miller, who informed him that Hager had been task trained, but he merely needed to sign the form. Although the ALJ did not credit Miller's testimony regarding task training, the ALJ properly credited that Evans and Milam believed the task training had been completed. Further, the General Counsel did not except to the ALJ's credibility findings, as he noted in his brief, "[t]he exceptions raised [...] are not challenges to ALJ Bogas' credibility determinations." (General Counsel's Brief at 17).

[6] The "other ones" Milam referenced were incidents involving employees James McDonald and David Muenich, discussed in Section F, *supra*.

> And he turns almost 180 degrees. There's no apparent brake marks in the road at all, and he drives through the berm. And, I think—I think that's cause for dismissal. [...] Frankly, he should have and could have been a fatality. It was a very, very serious situation." (Tr. at 173-174).

Consequently, on September 21, 2017, Respondent discharged Hager for "negligent/unsafe act resulting in bodily injury and property damage." (RX-20).

F. OTHER EMPLOYEE ACCIDENTS

Although Hager's accident was the most serious accident at Glancy mine, other employees have been involved in accidents and minor property damage.[7] David Muenich, who served as the Charging Party's witness in the August 24, 2017 representation hearing, was involved in two accidents.[8] On July 19, 2017, Muenich drove a fuel truck onto a coal pile to service a piece of equipment that was sitting on a coal pile. (Tr. at 275). When pulling off the coal pile, the roadway was to the left, but Muenich drove off the edge of the coal pile onto the pit floor. (Tr. at 184, 275). Because the pile was black and the pit was black, Muenich thought he was driving toward the slope rather than the edge of the coal pile. (Tr. at 99, 183-184, 275). Blackhawk Mining LLC's Vice President of Surface Operations Sammy Maggard noted that Muenich's accident involved being on a coal seam that was on a pit floor and everything was the same color, which made it difficult to determine where the drivable slope was located and no marker or barrier to identify the ledge or the ramp. (Tr. at 275). Maggard testified he had a

[7] In Respondent's employee handbook, it advises employees that negligent operation of Respondent's equipment will result in immediate termination. (JX-7). However, in the short history of Glancy mine, Evans has always evaluated all incidents individually. (Tr. at 179-191).

[8] The General Counsel excepted to the characterization of two accidents, but Muenich, the General Counsel's witness at the hearing, only testified to two incidents. (General Counsel's Exception 5). There is no record testimony regarding another accident. (Tr. at 89-103). Further, the General Counsel did not present any evidence of an additional accident.

similar accident when he was younger and he determined that a suspension as the appropriate discipline.[9] (Tr. at 184-185, 275).

Muenich was involved in another incident on February 15, 2018, after he testified on behalf of the Charging Party in the representation hearing. (Tr. at 101-102, 187). Muenich was operating a truck with a defective fuel gauge, and Muenich's engine ran out of fuel. The best practice is for the operator to fill the truck up at the beginning of the shift, which would have prevented the truck from running out of fuel. (Tr. at 187-188). However, the incident did not involve any injuries or property damage, and Respondent determined that a suspension was appropriate. (Tr. at 103, 188).

On October 3, 2017, employee David Dingess was involved in an accident at night where he caused damage to an excavator. (Tr. at 181). Dingess placed the excavator on the top of very large rocks to do a particular task and one of the rocks moved, which caused the excavator to slide to the right and tip over. (Tr. at 181-182). Although Dingess arguably could have better positioned the excavator, the damage was not a result of any negligence that he displayed because Dingess could not have known the rock might shift. (Tr. at 182, 216). Respondent issued Dingess a three day suspension.[10]

Additionally, on October 19, 2017, the Charging Party's designated election observer, James McDonald, backed his truck into a portable toilet. (Tr. at 109-110; 189). No one, including McDonald, was injured, but the portable toilet was destroyed. (Tr. at 189). Respondent determined an oral reprimand was appropriate because although McDonald should have more sufficiently checked his surroundings, the portable toilet had been placed in that location for the

[9] The fuel truck accident did not involve as costly repairs; unlike the rock truck that was out of service for several weeks. The repairs cost for the parts to fix the fuel truck were between $6,000 and $7,000 (Tr. at 276), while the rock truck's parts cost at least $61,000.00. Also, Muenich's accident did not shut the mine down like Hager's did.
[10] The excavator required repairs costing around $13,500 (Tr. at 277).

first time that morning. (Tr. at 190). Further, the area was congested and there was low visibility. (Tr. at 191-192).

III. ARGUMENT

A. RESPONDENT MET ITS BURDEN UNDER *WRIGHT LINE* (GENERAL COUNSEL'S EXCEPTIONS 6-7, 13-14)

The ALJ properly concluded that Respondent would have discharged Jerry Hager whether or not Hager engaged in activities protected by the Act. (ALJD at 7). Pursuant to the Board's *Wright Line* decision, the General Counsel bears the initial burden of showing that Respondent's decision to discharge an employee is motivated, at least in part, by activities protected by the Act. *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 889 (1st Cir. 1981), cert. denied, 455 U.S. 989 (1982), approved in *NLRB v. Transportation Corp.*, 462 U.S. 393 (1983); *American Gardens Mgmt Co.*, 338 NLRB 644, 644-645 (2001) (extending application of *Wright Line* analysis to Section 8(a)(4) claims). If the General Counsel establishes its initial burden, the burden shifts to the employer to establish that it would have taken the same action absent the protected conduct. *Id.* The ALJ found that the General Counsel established its initial showing, albeit weakly. (ALJD at 16). Consequently, the ALJ analyzed whether Respondent demonstrated that it would have taken the same action absent Hager's alleged protected conduct. (ALJD at 14). The ALJ correctly concluded that Respondent met its burden. (ALJD at 16).

It is undisputed that Hager was involved in a serious, potentially fatal, crash that was avoidable by simply stopping his truck first before bending over under the console to retrieve his hard hat from the truck's floorboard. Hager suffered disabling head and spinal injuries. (ALJD at 17; Tr. at 62). The accident resulted in a MSHA investigation, the shutdown of the mine, $61,000 in repair costs, and 200 hours of Respondent's maintenance employees' time. The

gravity of Hager's accident is simply unparalleled to any other accident that had occurred at Glancy mine. (ALJD at 17).

Clearly, Hager's crash was completely avoidable; it occurred on a clear day with no adverse weather conditions, and no slope issues. There was no evidence of any sight impairments, or extraordinary circumstances. There was no evidence of mechanical issues with the truck, or issues with the safety berm or the road itself. Hager's actions were just what HR Manager Colin Milam judged them to be; a reckless and careless error in judgment. There was no dispute that Hager bent down to retrieve his hard hat. (Tr. at 79). Further, Hager admitted that while his 550,000 ton truck was still proceeding downhill, he took his eyes off of the road. (Tr. at 79). There is no evidence that Hager attempted to minimize the impact of the accident as there were no brake marks on the road. Hager, himself, assigned fault for the accident as "a hundred percent Jerry Hager." (Tr. at 69-70). Nor was there any evidence that the task training would have prevented Hager, an experienced rock truck driver, from making the reckless decision he made that day.

The Board has held that when analyzing whether an employer would have taken the same action absent any protected conduct, the critical inquiry is not "whether the business reason cited by [the employer was] good or bad, but whether [it was] honestly invoked and [was] the cause of the change." *Ryder Distribution Resources*, 311 NLRB 814, 815 (1993) (quoting *NLRB v. Savoy Laundry*, 327 F.2d 370, 371 (2d Cir. 1964), enfd. in part 137 NLRB 306 (1962)). Respondent discharged Hager because of his admitted reckless conduct, and ensuing bodily and property damage, which is a legitimate reason unconnected to any protected activities. The Board has routinely held that misconduct and property damage are valid reasons to discharge an employee. See *Airbonne Freight Co.*, 343 NLRB 580 (2004) (employee's misconduct valid reason for discharge); *Cargill*, 315 NLRB 735 (1994) (employer justified in discharging employee who

damaged equipment). Accordingly, the ALJ's decision is well supported by Board precedent, and the record, and should be upheld.

B. HAGER WAS NOT TREATED DISPARATELY FROM OTHER EMPLOYEES (GENERAL COUNSEL'S EXCEPTIONS 5, 8-9)

The ALJ properly concluded that Hager was not treated disparately than other employees who were not discharged. (ALJD at 11). The General Counsel argues that employees Muenich and Dingess were treated more favorably than Hager. (GC Brief at 5-6). However, the ALJ properly determined that the employees were treated differently based on the severity of the accidents. (ALJD at 11-14). In order for Respondent's actions towards putative comparators to be persuasive as disparate treatment, the comparators must have been engaged in the same activity as the alleged discriminatee. See *Diamond Elec. Man. Corp.*, 346 NLRB 857, 859 (2006). Further, when the General Counsel presents evidence of disparate treatment, an employer can "still meet its *Wright Line* burden by showing that 'the disparity in discipline between the alleged [discriminatee] and the General Counsel's comparators is attributable to differences in work history, to the severity of misconduct or some other factor unrelated to union activity." *Walker Stainless*, 334 NLRB 1260, 1262 (2001) (citing *Avondale Indus.*, 329 NLRB 1064 (1999)). Here, Hager's discharge was justified as Hager's accident was significantly more serious and more costly than any other previous accident at the mine.

Muenich's July 19, 2017 accident occurred when he drove off of a ledge adjacent to the slope. Muenich misjudged where the drivable slope was located because the slope, the coal seam, the ledge, and the coal pit area were all the same color. While Muenich misjudged the drivable road, he did not cause the accident by sacrificing his view of the road. Additionally, Muenich's accident was relatively minor compared with Hager's. Muenich was not seriously injured, it did not require a MSHA investigation, and it did not interrupt Respondent's

operations. Further, the fuel truck did not require anywhere near the cost to repair compared to the rock truck.

Dingess' October 3, 2017 accident occurred at night, not on a clear day, when Dingess positioned an excavator on top of rocks. The rocks shifted, and the excavator became unbalanced and tipped onto its side. However, Dingess routinely performed his duties in this manner, and the accident did not occur because of any negligence on Dingess' behalf. Dingess was not seriously injured. His accident did not require a MSHA investigation, and it did not interrupt Respondent's operations. Additionally, the excavator did not require anywhere near the cost to repair compared to the rock truck.

Notably, McDonald and Muenich were also involved in activity supporting the Charging Party's organization campaign. In fact, McDonald served as the Charging Party's election observer, and Respondent believed that he was the lead proponent of the Charging Party's organizing efforts at Glancy mine. (Tr. at 138-139). Like Hager, Muenich also testified on the Charging Party's behalf at the August 24, 2017 representation election. Therefore, to the extent, the General Counsel is arguing that Respondent took harsher action towards Hager because of his support of the Charging Party's organizational campaign or because he testified on behalf of the Charging Party at the August 24 hearing when compared to these same employees who engaged in similar or more substantial union activities supporting the Charging Party's efforts, his argument defies logic. See *Cross Co. v. NLRB*, 260 F.2d 746-747 (6th Cir. 1958). Hager's discharge is simply not related to any activities protected by the Act.

None of the other accidents are comparable to Hager's accident as none of the other accidents even broaches the magnitude of Hager's accident. Hager's accident required a MSHA investigation, MSHA citations, the shutdown of the mine, severe bodily injury and was at least three times as costly to repair as the next most costly accident. The ALJ properly concluded that

the other accidents relied on by the General Counsel were not comparable to Hager's accident both in the terms of the severity and the employee's relative carelessness, and properly determined that Respondent would have discharged Hager absent any protected concerted activities. (ALJD at 17).

C. RESPONDENT'S ALLEGED FAILURE TO TASK TRAIN HAGER IS NOT PRETEXTUAL (GENERAL COUNSEL'S EXCEPTIONS 1-4, 10-12; CHARGING PARTY'S EXCEPTIONS 1-2)

In his brief, the General Counsel repeatedly argues the significance of Respondent's alleged failure to task train Hager on the Caterpillar 785C rock truck. (General Counsel's Brief at 3-4, 7-15). The General Counsel argues that Respondent's alleged failure to task train Hager establishes pretext for Respondent's discharge. Additionally, the General Counsel argues that Respondent's failure to credit Hager's lack of task training as a mitigating factor warrants lesser discipline. (General Counsel's Brief at 10). The ALJ considered whether Hager was task trained, and ultimately determined he was not. (ALJD at 18). However, the ALJ carefully considered the General Counsel's arguments about the significance of task training, and correctly dismissed them as a "red herring." (ALJD at 18).

Hager was clearly experienced at driving a Caterpillar 785C rock truck. There was no dispute that Miller observed Hager's performance on the truck for a week and Hager had no issues operating the truck. (Tr. at 228-233). There is no evidence that Hager raised any issues or concerns about the operation of the truck. There is no evidence that Hager did not know how to operate the truck, or felt unsafe doing so. Moreover, Hager had previously been task trained on a rock truck on at least two occasions. (Tr. at 67-68). Hager was an experienced operator with over a dozen years of operating rock trucks, including the Caterpillar 785C rock truck. (Tr. at 69).

Further, assuming, *arguendo*, Hager was not task trained on the Caterpillar 785C rock truck, his lack of task training had no impact on his accident or his ultimate discharge. As the

ALJ noted, "Hager did not claim that his decision to duck down under the dashboard resulted from his not being adequately familiar with the proper operation of the truck, or because he had not been trained to keep the road in view while driving." (ALJD at 18). Frankly, it is implausible to believe that an experienced operator would need to be trained not to put his head below the console, and not to take his eyes off the road while he is driving to do know not to do so. (ALJD at 18). Hager operated the truck on numerous occasions, and knew exactly how an operator should conduct themselves and maneuver a rock truck.

Nonetheless, the record establishes that before making its decision to discharge Hager, Respondent investigated whether Hager was task trained on the rock truck. Evans and Milam asked Miller about task training Hager. Miller assured them that the task training form was completed and the training was completed, but the form was not yet signed. (Tr. at 172; 349). Evans and Milam had no reason not to rely on Miller's assertion. Miller was the only supervisor in a position to know whether or not Hager was task trained, and Miller was not involved in the decision to discharge Hager. (Tr. at 251). Evans and Milam also inquired of the MSHA investigator whether Hager was task trained, and based on what they had been told, they both came to the conclusion that Hager was task trained. (Tr. at 349).

In fact, MSHA did not cite Respondent for failure to task train Hager following MSHA's thorough investigation and interview of Hager and Miller. (RX-6, pp. 1-120). Respondent presented credible evidence at the hearing that MSHA's regulations require any and every violation of law to be cited and failure to task train is definitely a violation of the law. (Tr. at 311-318). Evans' and Milam's determination was reasonable based on the assertions of their supervisor, and an independent federal investigator. Even if Evans and Milam ultimately concluded that Hager was not task trained on the rock truck, Respondent is not required to consider it as a mitigating factor just because the General Counsel thinks it should See *Ryder*

Distribution Resources, 311 NLRB 814 (1993) (Board should not substitute its own business judgment for that of the employer). To the extent the General Counsel would have reached a different conclusion, it is immaterial as Respondent's decision to discharge Hager was not based on his protected activity. Respondent's decision to discharge Hager was solely based on his reckless and careless decision-making. Accordingly, the ALJ's determination is well supported by the record, and should be upheld.

IV. CONCLUSION

For the reasons discussed above, Respondent submits that the record evidence supports the ALJ's decision, and requires a finding that Respondent did not violate the Act. Respondent respectfully requests that the ALJ's Order be upheld, and the complaint be dismissed in its entirety.

Dated August 13, 2018.

Respectfully submitted,

By Counsel,

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CERTIFICATE OF SERVICE

I hereby certify that on August 13, 2018, a copy of Respondent Rockwell Mining LLC's Answering Brief to General Counsel and Charging Party's Exceptions to the Administrative Law Judge's Decision was electronically filed via NLRB E-Filing system with the Office of the Executive Secretary.

I further certify that on August 13, 2018, a copy of Respondent Rockwell Mining LLC's Answering Brief to General Counsel and Charging Party's Exceptions to the Administrative Law Judge's Decision was served by e-mail on the following:

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